Supreme Court, U.S.
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ORIGINAL

(2)

No. 95-1058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF NEVADA, Petitioner

v.

CORKY DESIMONE, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON BEHALF OF RESPONDENT, CORKY DESIMONE

Respondent, CORKY DESIMONE, by and through his counsel, hereby applies, pursuant to Rule 39 of the Rules of The United States Supreme Court, for leave to proceed in forma pauperis in his opposition to the petition for writ of certiorari in the above-entitled case. The reason for this request is set forth in the attached affidavit.

DATED this 2 day of April, 1996.

MICHAEL R. SPECCHIO
Washoe County Public
Defender

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SUPREME COURT, U.S.

Respondent is still indigent and would qualify for representation by the Washoe County Public Defender;

6. That the Washoe County Public Defender is an institutional defender of indigent defendants and is subject to tight budgetary constraints and thus seeks leave under Rule 39 so that it may file its Brief in Opposition in conformity with Rule 33(2)(b);

7. That this motion is made in good faith and not for purposes of delay.

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC
DEFENDER

Subscribed and Sworn to before me this 8 day of April, 1996.

NOTARY PUBLIC

AMY A. PETERSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 96-0224-2 - EXPIRES DEC. 8, 1999

WASHOE COUNTY

"To Protect and To Serve"

OFFICE OF THE PUBLIC DEFENDER
MICHAEL R. SPECCHIO, PUBLIC DEFENDER

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April 10, 1996

William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

ATTENTION: Kathy Tycz

VIA FAX: (202) 479-3021

Re: Nevada v. Desimone, No. 95-1058

Dear Ms. Tycz,

This is a follow-up to our conversation of this date wherein I explained to you that we represent Mr. Desimone in this action because: (1) we were appointed in the State court system to represent him at trial and on appeal due to his indigent status; (2) that the State of Nevada served a copy of its petition for writ of certiorari in this matter on our office because of our prior representation; and (3) the Court requested that we file a response to the State's petition after we had filed a waiver of response.

As I also explained, Mr. Desimone is no longer in the State of Nevada. We have had contact with him by telephone and will attempt to locate him so that we can have him fill out an appropriate affidavit. That affidavit will be sent to you upon its prompt return to us.

I hope this information is helpful to you. If you have any questions please do not hesitate to contact me.

Sincerely,

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC DEFENDER

by: _____
John Reese Petty
Chief Appellate Deputy

ORIGINAL

No. 95-1058

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF NEVADA,

Petitioner,

v.

CORKY DESIMONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION

MICHAEL R. SPECCHIO*
Washoe County Public Defender

JOHN REESE PETTY
Chief Appellate Deputy
195 South Sierra Street
Reno, Nevada 89501
(702) 328-3464

Counsel for Respondent.
* Attorney of Record

QUESTIONS PRESENTED

1. Does the mere entry of an uncontested, uncollected and unpaid default judgment entered in a drug tax proceeding constitute "punishment" for double jeopardy analysis, this barring a subsequent criminal prosecution?

2. Does jeopardy attach upon the entry of a default judgment in a drug tax proceeding which is not predicated upon a finding of guilt?

3. If tax liability, under Nevada's drug tax statute, rests on elements which are different from those necessary for criminal liability, are they the same offense?

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October Term, 1995

THE STATE OF NEVADA,

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v.

CORKY DESIMONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION

Respondent, Corky Desimone, respectfully requests that this Court deny the petition for writ of certiorari which seeks to review the opinion of the Supreme Court of the State of Nevada below. That opinion is reported at 111 Nev. ____, 904 P.2d 1 (1995) and is reprinted in the petition for writ of certiorari at Appendix A.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The double jeopardy clause of the Fifth Amendment to the Constitution of the United States.

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Chapter 372A of the Nevada Revised Statutes.

STATEMENT OF THE CASE

The facts of this case are not in dispute and are fully set forth in the opinion of the Supreme Court of the State of Nevada at 111 Nev. ____, ____, 904 P.2d at 2-3. Accordingly, Respondent, Corky Desimone, accepts the "Statement of the Case" as set forth in the petition for writ of certiorari at 3-5.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY SETTLED THE QUESTION WHETHER A TAX MAY CONSTITUTE "PUNISHMENT" FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS, AND THE OPINION OF THE NEVADA STATE SUPREME COURT BELOW IS FAITHFUL TO THIS COURT'S HOLDINGS.

In Department of Revenue of Montana v. Kurth Ranch, ____ U.S. ____, 114 S.Ct. 1937 (1994), this Court addressed a similar taxing scheme as that in Nevada and noted that while it

"had never held that a tax violated the Double Jeopardy Clause, [it has] assumed that one might." 114 S.Ct. at 1945-1946 (footnote omitted). This Court noted that although taxes are motivated by revenue-raising purposes rather than punitive purposes nonetheless "at some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line." 114 S.Ct. at 1946. In finding that the tax did cross the line this Court said:

> [w]e begin by noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment. In this case, although those factors are not dispositive, they are at least consistent with a punitive character. A significant part of the assessment was more than eight times the drug's market value -- a remarkably high tax. ... .
>
> Other unusual features, however, set the Montana statute apart from most taxes. First, this so-called tax is conditioned on the commission of a crime. That condition is "significant of penal and prohibitory intent rather than the gathering of revenue." .... In this case, the tax assessment not only hinges on the commission of a crime, it is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.
>
> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed <u>despite</u> their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's

> benefits -- such as creating employment, satisfying customer demand, and providing tax revenues -- are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufactures, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tx could be equally well served by increasing the fine imposed upon conviction.

114 S.Ct. at 1946-1947 (footnotes omitted, emphasis in the original).

This Court concluded that the tax is "fairly characterized as punishment" and affirmed the judgment of the Court of Appeals. 114 S.Ct. at 1948. This Court said that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'" 114 S.Ct. 1948.

In the instant case the same is true. Thus, in line with this Court's teachings, the Nevada Supreme Court analyzed the Nevada drug tax and found that NRS Chapter 372A "exhibits the same punitive aspects as the Montana illegal drug tax." 904 P.2d at 4. Continuing, the court said:

> First, the Nevada law imposes a $1,000 per-gram fee for methamphetamine (and a $100 per-gram fee for marijuana). This amount far exceeds the high rate of taxation condemned in Kurth Ranch.
>
> Second, potential tax proceeds are ear-marked to pay for anti-crime measures, as were the proceeds of the tax analyzed in Kurth Ranch.

> Third, the tax is designed to punish criminal activity. As Desimone point out, pharmaceutical companies, pharmacists, and medical practitioners are exempt from the tax. Thus, although criminal activity is not strictly required before the tax is imposed, the non-criminal possession and sale of controlled substances by legitimate manufacturers, distributors, and ultimate users fall outside the scope of the tax. ... . The retroactive use of the tax to punish, rather than to seek registration of controlled substances, is the manifest intent of NRS chapter 372A.
>
> Fourth, the methamphetamine confiscated by the State, like the marijuana confiscated in Kurth Ranch, was not in the possession or ownership of the defendant when the tax was imposed.
>
> We conclude, therefore, that the payment of a tax pursuant to NRS chapter 372A constitutes punishment, triggering the protections of the Double Jeopardy Clause. The Kurth Ranch factors reveal that NRS chapter 372A is far-removed in crucial respects from a standard tax statute.

904 P.2d at 4-5 (citations and footnote omitted).

The Supreme Court of the State of Nevada's opinion in this case was correct and is faithful to this Court's double jeopardy jurisprudence. Thus, the petition for writ of certiorari should be denied.

II.

THE FACT THAT THE TAX JUDGMENT ENTERED AGAINST MR. DESIMONE WAS BY WAY OF A DEFAULT JUDGMENT DOES NOT PRECLUDE A FINDING OF "PUNISHMENT" FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS.

The gravamen of the instant petition for writ of certiorari is that because the tax judgment entered against Mr. Desimone was by way of a default judgment, he suffered no

"punishment" and thus cannot invoke the protections of the Double Jeopardy clause concerning his subsequent criminal case. Indeed, drawing from forfeiture cases, Petitioner asserts that "if a person whose property is subject to forfeiture does not appear and make a claim, this omission results in the 'owner' not being placed in former jeopardy." Petition for Writ of Certiorari at 10. There are at least two things wrong with this analogy.

First, assuming that this is a correct statement of the law,[1] it has no bearing on the imposition of a tax judgment. The purpose of forfeiture is to punish by taking away property to which one has an ownership interest. In contrast the tax in this case was retroactively applied to "punish, rather to seek registration of controlled substances ... ." Desimone v. State, 111 Nev. at ____, 904 P.2d at 5. That is, the focus must be on the character of the sanctions as punishment, rather than the type of proceeding by which the sanctions were imposed. See Kurth Ranch, ____ U.S. ____, 114 S.Ct. at 1945-1948 (Court did not analyze the nature of the administrative proceeding to collect tax, but rather the character of the tax itself and concluded that it constituted punishment under the Double Jeopardy Clause).

Second, there is every indication in the developing

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[1]This proposition appears to be derived from Serfass v. United States, 420 U.S. 377 (1975) and United States v. Torres, 28 F.3d 1463 (7th Cir.1994), cert. denied, 115 S.Ct. 669 (1994), both of which are relied upon by the Petitioner herein.

caselaw that the forfeiture proposition stated above is starting to unravel. See, e.g., United States v. Brophil, 899 F.Supp. 1257 (D.Vt.1995); and Gainer v. United States, 904 F.Supp. 1234 (D.Kan.1995).

In Gainer, the district court, following Brophil, made the following observations:

> [o]f those courts which have addressed the issue that contesting the forfeiture is a condition precedent to raising a double jeopardy claim, the majority has held that jeopardy does not attach where the defendant does not become a party to the civil forfeiture proceedings. See United States v. Cretacci, 62 F.3d 307 (9th Cir.1995)(criminal prosecution following an uncontested administrative forfeiture does not violate the Double Jeopardy Clause); United States v. Torres, 28 F.3d 1463 (7th Cir.), cert. denied, ____ U.S. ____, 115 S.Ct. 669, 130 L.Ed.2d 603 (1994)(defendant cannot be placed in jeopardy if he has not appeared as a party in a proceeding; there having been no prior jeopardy, double jeopardy cannot apply). But see United States v. Brophil, 899 F.Supp. 1257 (D.Vt. 1995). (Civil forfeiture proceedings can place an individual in jeopardy even if the individual does not contest the proceeding).
>
> The Torres case appears to be the most widely cited and followed case in this emerging area of law of the civil forfeiture and criminal prosecution. ... .
>
> The district court in Brophil, however, held that failure to appear at a civil forfeiture proceeding does not preclude an individual from raising a double jeopardy claim in a subsequent criminal prosecution. Specifically, the court found that the Torres court had relied on Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) to support its conclusion that a defendant is not placed in jeopardy if he fails to appear as a party to a civil forfeiture proceeding. Serfass, was not a multiple

> punishment case as was Torres, but rather a successive prosecution case. Brophil, 899 F.Supp. at 1260-62. Discussing the differences between multiple punishment and successive prosecution cases, the Brophil court concluded that Serfass and, by extension Torres, could not be applied to multiple punishment cases. However, the holding of Halper and Kurth Ranch, multiple prosecution cases, are applicable.
>
> Using this reasoning, the Brophil court found Kurth Ranch correctly states the multiple punishment position by examining the character of the act that is the punishment rather than examining the nature of the proceeding or the defendant's appearance at the proceeding. Id. at 1264. "It is clear under Kurth Ranch that a civil proceeding to collect a monetary penalty for a crime and a separate criminal prosecution for the same crime constitute separate proceedings for purposes of the Double Jeopardy Clause." Id. at 1265.

904 F.Supp. at 1236-1237. Accord, United States v. Ursery, 59 F.3d 568, 575 (6th Cir.1995)(the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense). Thus, "the character of the act of forfeiture is without question punishment whether or not a defendant appears as part of the proceeding." Gainer v. United States, 904 F.Supp. at 1237.

CONCLUSION

The Double Jeopardy Clause of the United States Constitution provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..." U.S.Const.Amend. V. This clause protects against three distinct abuses: (1) a second prosecution for the same offense

after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. United States v. Harper, 490 U.S. 435, 440 (1989); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

In the instant case the Supreme Court of the State of Nevada correctly held that the drug-tax judgment that had been taken against Respondent under the provisions of NRS chapter 372A constituted punishment. Thus, that punishment which arose out of the same criminal offense but which was imposed first, precluded the State from further criminal prosecution of Mr. Desimone.

Accordingly, the petition for certiorari should be denied.

Respectfully Submitted

MICHAEL R. SPECCHIO*
WASHOE COUNTY PUBLIC DEFENDER

Michael R. Specchio

John Reese Petty
Chief Appellate Deputy
195 South Sierra Street
Reno, Nevada 89501
(702) 328-3464

Counsel for Respondent

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WASHOE COUNTY

"To Protect and To Serve"

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April 8, 1996

William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Re: Nevada v. Desimone, No. 95-1058

Dear Mr. Suter,

Please find enclosed one (1) original and ten (10) copies of a Brief in Opposition to the petition for writ of certiorari; one (1) and ten (10) copies of a motion for leave to proceed in forma pauperis on behalf of respondent, Corky Desimone; and one (1) and ten (10) copies of a certificate of service. By this letter I also certify that a copy of this letter and a copy of each of the documents listed above have been personally delivered to Gary H. Hatlestad, Deputy District Attorney, attorney of record for petitioner.

Sincerely,

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC DEFENDER

by: _____
John Reese Petty
Chief Appellate Deputy

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